

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

715

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,428
(Cr. No. 1692-68)

UNITED STATES OF AMERICA,

Appellee.

V.

REGINALD A. LUCAS,

Appellant.

Appeal from the United States District Court
for the District of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

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Nathan J. Taulson
CLERK

(i)

STATEMENT OF QUESTIONS PRESENTED

In the opinion of the Appellant, the following questions are presented:

1. Whether it is plain error for the Court to exclude previous convictions on the ground of the Luck decision and then permit testimony about a photograph of the Appellant in the possession of the police, and also to permit the prosecutor to show the Appellant a quantity of capsules and ask him "Have you ever seen anything that looks like that?".

2. When the police are trying to put a defendant under arrest and make a lunge for him and begin pursuing him up a city street, does the question of probable cause for the arrest occur at the beginning of the pursuit.

REFERENCES TO RULINGS

Court's denial of defendant's motion for suppression of evidence (Supp. tr. 15) and the Court's denial of defendant's motion for acquittal at the conclusion of all of the evidence (Tr. 80).

~~45~~ This case has not previously been before this court.

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction for narcotics violations. The jury found the defendant guilty on April 18, 1969, of a four count indictment: Count 1, violation Title 26 United States Code Section 4704a; Count 2, violation Title 21 United States Code Section 174; Count 3, Title 26 United States Code Section 4704(a); and Count 4, violation Title 21 United States Code Section 174. On July 23, 1969,

the Court sentenced the appellant pursuant to the provisions of the Federal Youth Corrections Act under Section 5010(b) Title 18, United States Code for treatment and supervision and to discharge by the Youth Correction Division of the Board of Parole as provided in Section 5017(c) of Chapter 402. The appellant is presently serving the term indicated. This Court has jurisdiction under the provisions of the Act of June 25, 1948, 62 Stat. 929, U.S.C. Title 28, Sec. 1291.

STATEMENT OF THE CASE

Appellant was tried in the District Court upon an indictment charging him with various offenses against the Narcotics Laws. The events as shown at the trial took place on July 30, 1968 and also on August 2, 1968.

Preliminarily appellant filed a Motion to "Suppress Evidence" which was heard, argued and denied prior to trial (supplemental Tr. 15).

The Government's evidence showed that, at approximately 6:00 P.M., on July 30, 1968, two Metropolitan Police Officers in plain clothes, Privates Neer and Walker, saw the Appellant among a group of subjects in the vicinity of 745 - 8th Street, S.E., Washington, D. C. As the police approached, appellant broke and ran. The police pursued him, and testified that when

he approached an alley at 727 - 8th Street, S.E., he removed an object from his right pocket and threw it down on the ground. It was a brown, cream-colored envelope containing capsules, and a field test revealed that the capsules contained heroin.

On August 2, 1968, at about 3:45 P.M., the same two officers were in vicinity of the 500 block of 8th Street, S.E., when they again observed Appellant. Private Neer engaged appellant in conversation, asked him for his name and address and then confronted him with a picture, at which point appellant began running North on 8th Street, was pursued by the two officers and eventually apprehended.

Private Walker testified that during the pursuit he observed the appellant attempting to put something in his mouth. The appellant was found to have in his hand a cellophane package containing eleven gelatin capsules.

The arrest of August 2, 1968 was made without aid of a warrant of any kind.

Defendant took the stand in his own behalf and denied possession of narcotics on either of the dates alleged in the indictment.

At a bench conference (Tr. 62) the Assistant United States Attorney argued to the Court that defendant was convicted in 1967 on a "narcotics charge" and that he had also been

convicted of "petit larceny". The Government attempted to use said evidence on cross-examination but the court (Tr. 63) declined to permit such cross-examination in deference to the "Luck" decision.

Officer Walker testified he had never seen the defendant prior to July 30, 1968; but on August 2, 1968, when he approached the appellant, he "pulled a picture out and showed it to the subject". Officer Walker (Tr. 34) further testified: "We were in the 500 block of 8th Street making observations of several subjects which were moving into a poolroom located there which was a known hang-out for several subjects. We were checking through our photographs and vagrancy observations and looked up and noticed one subject in particular standing in front of the poolroom". On being asked who the subject was, Walker said, "This was the defendant, Reginald Lucas".

On cross-examination the prosecutor asked the appellant (Tr. 78), "I hand you government exhibits two for examination and now admitted into evidence and open that up and I will ask you to take a close look at that. Have you ever seen anything that looks like that before?" Appellant answered, "Yes, I have seen something that looked like that before." He was also asked, "Did you have that bag on you on August 2?"

He answered, "No sir, I did not."

The Trial Court in denying Appellant's pretrial motion for suppression of evidence (Supp. Tr. 15) said: "I really don't think so. They were trying to put him under arrest but not in custody until they had control over him and I don't believe your motion is well taken and will be denied."

The fact finder implies that the police had in fact made an overt effort to place the defendant under arrest on July 30, 1968 before the defendant began to run.

STATUTES INVOLVED

26 U.S.C.A. Sec. 4704

"(a) General requirement. - It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

21 U.S.C.A. Sec. 174

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than

five or more than twenty years and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000."

SUMMARY OF ARGUMENT

I

Introduction of police photographs of defendant into evidence is tantamount to telling a jury that the defendant has a prior criminal record.

When a trial court specifically precludes the introduction of prior convictions pursuant to the Luck decision, he inferentially rules out all evidence of prior convictions.

II

Whether or not a policeman has probable cause for an arrest shall be determined at the time the arrest begins.

ARGUMENT I

Photographs of the Appellant were erroneously admitted into evidence.

The law of the instant case as dictated by the able trial judge was that prior convictions were not to be admitted into evidence by way of impeachment of the appellant. (Tr. 63) In direct conflict with the aforementioned ruling was the testimony

of Officer Walker "And at this time I pulled a picture out and showed it to the subject" (Tr. 6). Officer Walker: "We were checking through out photographs and vagrancy observations and looked up and noticed one subject in particular standing in front of the poolroom" (Tr. 34). In Barnes vs. United States, 124 U.S. App. D.C. 318 (1966) this Court had occasion to discuss the law pertaining to admission of photographs of a defendant into evidence. The court said, inter alia, "This approach could not be put forward by defense counsel without some risk to the accused, for the testimony that the police had on hand, photographs of the accused, might conceivably have led a juror, at least a sophisticated juror, to hypothesize that the accused had a police record."

In the instant case there was no identity issue concerning appellant, and therefore the introduction of evidence showing that the police had in their possession photographs of the defendant could only prejudice the defendant's cause and suggest to the jury that the defendant had a prior record of police involvement. Judge Prettyman, in his dissent in the Barnes case cited supra, underlined the reasonableness of such an inference when he said, "I submit the fact the police carried pictures with them while on duty conclusively gives rise to

that inference (person involved has been in trouble with the police)."

The prosecutor, by his questioning, also suggested to the jury that the appellant had a previous involvement with narcotics as shown by the following colloquy: (Prosecutor speaking) "I hand you Government exhibit 2 for identification and now admitted into evidence and open that up and I will ask you to take a close look at that. Have you ever seen anything that looks like that before?" (Defendant answering) "Yes, I have seen something that looked like that before." (Prosecutor) "Did you have that bag on August 2?" (Defendant) "No, sir, I did not." (Tr. 78)

The only reasonable inference that can be drawn from the aforementioned colloquy is that the prosecutor knew (and wanted the jury to know) that the appellant, at a time prior to July 30, 1968 had in his possession - or was in close proximity to - narcotics. The questioning shows knowledge of a prior violation of the Narcotics Laws by the appellant, and such had to be the intention of the prosecutor in pursuing such a line of inquiry.

The questioning pertaining to an inference of prior involvement with narcotics, and the use of testimony dealing with photographs of the appellant were plain error, requiring reversal.

ARGUMENT II

Arrest was without probable cause and the subsequent search therefore unlawful.

Exhibits one and two introduced in evidence herein were obtained as a result of an illegal arrest and therefore what followed was an unlawful search of the appellant in violation of his rights under the Fourth Amendment of the United States Constitution.

On August 2, 1968, the police arrested the appellant on information gathered on July 30, 1968, and the validity of the second arrest is necessarily determined by what transpired on July 30, 1968.

It is the contention of the appellant that an arrest occurred on July 30, 1968, prior to the time that he began to run from the police. It is therefore his contention that probable cause for the arrest is to be determined at that particular juncture and not subsequently, when something was allegedly dropped by him while being pursued by the police.

On July 30, 1968 when the appellant was approached by the police officers, he was unknown to Officer Walker (Supp. Tr. 4) and he was known to Officer Neer as a narcotics user (Supp. Tr. 8). Neither officer had grounds, at that time, for a lawful arrest of the appellant.

The threshold question regarding the intention of the police at that particular time has already been determined by the trial court (Supp. Tr. 15): "I really don't think so. They were trying to put him under arrest but not in custody until they had control over him and I don't believe your motion is well taken and will be denied."

The fact finder has determined that it was the intention of the police to place the appellant under arrest when they first saw him on July 30, 1968.

We are aware of the holding in Green vs. United States 259 Fed. 2nd 180, 104 U.S. App. D.C. 183 when the court held: "Had he remained standing where he was first accosted, or had he merely refused to talk, the police would have lacked probable cause either to arrest or to search him". It is the contention of the appellant that the Greencase is an anomaly and the result of tortured reasoning that arriving at a conclusion that subsequently Green had attempted to commit an unlawful entry and therefore, that was the justification for his arrest.

The law we deem should be applicable is that enunciated in White vs. United States 271 Fed. 2nd, 829, 106 U.S. App. D. C. 246: "The officer had no warrant of any kind and no probable cause to accost appellant, requiring him to place his hands in a certain position and to frisk him". It is the

position of this brief that the "accosting" is the important attribute of the White holding and therefore is analagous to the instant case wherein it is the contention of the appellant that the "accosting" was without justification and that in fact the police intended to arrest the defendant and his apprehension or arrest was unreasonable and all that transpired subsequent to that "accosting" was of no legal significance in reconstructing the probable cause required of the police in the arrest.

It is the contention of the appellant that the arrest in this case occurred when on July 30, 1968 the police officers accosted the appellant and therefore the controlling law in this situation is as enunciated in the case of Rios v. United States, 364 U.S. 253. In that case the police surrounded a taxicab in which the defendant was seated. And then the police observed the defendant drop an envelop on the floor of said taxicab. The court was unsure at the time as to when the arrest occurred and therefore remanded the case to the trial court for a determination as regards the time of arrest. The court held "if therefore, the arrest occurred when the officers took their position at the doors of the taxicab, then nothing that occurred thereafter could make that arrest lawful or justify a search as its incident.."

In the instant case the court has determined that the police, prior to flight by the appellant on July 30, 1968, were trying to put him under arrest. It is therefore the appellant's contention that at that time the police either had probable cause or lacked it. The record is silent as regards any suggestion of probable cause on the part of the police and therefore that arrest was invalid and the subsequent discovery of the narcotics near or on the person of the appellant was the result of an unlawful search incident to an unlawful arrest. The trial court therefore should have suppressed the evidence in response to a motion to suppress made on the part of the appellant.

Respectfully submitted,

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